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## It is past time to re-frame thinking on the constitutional reconstruction of Iraq.

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Let me, a citizen of Ireland and the European Union, resident in the USA, provide a little shock to some of Europe's intellectual classes, whom I otherwise admire as supporters of international law, democracy, human rights, self-determination, constitutionality, and cosmopolitan thought.

From what I read of their views on Iraq many possess a narrow prism that only lets them see certain issues, namely, the illegality of the United States war to depose Saddam Hussein's regime; the falsehood of claims that his regime very recently possessed deployable weapons of mass destruction and was linked to al-Qaeda; the violation of human rights under the US-led occupation authority and the subsequent transitional government; and the necessity of relying on the United Nations as the sole means of providing legitimate international assistance in the constitutional reconstruction of Iraq.

Indeed some of Europe's intellectuals talk without qualification, or with approval, of an Iraqi "nationalist resistance" to the American Empire, while others, especially in government, express concern for the "inclusion of Sunnis" in constitutional renewal, to show their fair-mindedness toward the group that largely boycotted (or was intimidated from participating in) Iraq's first genuinely open elections in January 2005.

Some of the same intellectuals have recently worried that America is going to help Islamists to power – and destroy women's rights, but in the same breath insist that the Americans should not interfere in "Iraqi" ownership of the new constitution.

In Kurdistan, this prism I have sketched, without much burlesque, seems largely irrelevant, when it is not regarded as contradictory. In much of Shi'a Arab dominated Iraq, it would be regarded as similarly strange – if anyone had time to consider it. This prism, Europe's "conventional wisdom", distorts constructive thinking about the constitutional reconstruction of Iraq.

To say this is not to offer any apology for the mistakes – and indeed any crimes – of the Bush administration. But, it may enable a hearing for three obvious considerations required for realistic as well as forward-looking appraisal. First, the enemy of one's enemy - assuming George Bush's administration is the enemy of liberal intellectuals - is not necessarily one's

friend. Second, the pivotal friends of democratization in Iraq are among people who rarely call themselves “Iraqis”, namely Kurds, and Shi‘a Arabs (who are normally understood by Europeans to be outlaws of alcohol and the equality of women – and the clients of Iran). Third, those most opposed to the constitutional reconstruction of Iraq are found among Sunni Arabs, intent upon blocking the deal that might otherwise be made by the friends of democratization. Thanks to the foolish policy of inclusion of the unreconstructed, they include Saadoun Zuibeidi, Saddam’s former translator and a former Iraqi ambassador.

Let me suggest a different frame for understanding, not one derived in the least from American neo-conservatism. (I write as a European social democrat or American liberal, as you prefer). Consider an imaginary Germany, just liberated from a repressive dictatorship that had been supported by a minority of its population. Imagine that minority was mostly comprised of Protestants, both secular and Calvinist. International forces carried out the liberation, but with mixed motives, and subsequently mismanaged their occupation, badly.

Imagine that this German Protestant minority has governed, and been socially dominant, for eighty years, culminating in its collusion in an externally aggressive fascist dictatorship, that was both racially and religiously genocidal, and that unilaterally launched two wars against its neighbors. Evaluation shows that two communities were the primary victims of the deposed regime. One, a majority of the population, comprised Catholics, who have been treated as ill-educated, heretical and superstitious fools. The other, comprised a minority of Poles - led by secular Protestants, who slightly outnumber the German Protestants. Foreigners call these Poles, German Poles, even though they are not German. The German Protestants treated these Poles as racial inferiors, or, as comically backward people who should learn to speak German to advance themselves, or, worse, collaborators with the foreign powers who have just overthrown their regime. These “German” Poles have struggled for their independence since the creation of an artificial “Germany” by foreign powers - who put together provinces of the former Holy Roman Empire, betraying promises made to both Germans and Poles. But with international help, the Democratic Party of Poland and the Patriotic Union of Poland recently managed to carve out an autonomous “Poland-stan”, within what had been part of historic Poland – partitioned by great powers eighty years before. “Poland-stan” is the sole entity in conquered Germany to have the rule of law, social peace, economic development and fair treatment of minorities.

Perhaps this frame of reference may help persuade you that the dominant European vision on contemporary Iraq distorts political and moral sense. Would liberal intellectuals insist that the just described imaginary Germany immediately needed to make a constitution “in the interests of all Germans”, just by themselves, in which “just Germans” would determine the content of the constitution - and in which the United Nations would provide only technical assistance? Instead, they would begin by recognizing that not everyone in this imaginary Germany is a German. And, they might ask: “What about those Poles?” “Should *echte* Germans, Catholic or Protestant, decide their rights?” “What about those Catholics?” “Don’t they have dual loyalties, to the Vatican as well as Deutschland? And connections with Austria?” “Hasn’t Germany been defined in an exclusively Protestant way? Isn’t that what has to be changed?” “Wasn’t extensive centralization under dictatorship part of what made Germany a threat to its peoples – plural - and its neighbors?” “Surely an effort should be made to have a

“federalization”, as well as a “democratization” and “constitutionalization”, of political power?” “Should we let the German Protestant minority, and its reconstructed fascist or theological spokespersons, under the banner of “inclusion”, have a veto over the wishes of the former regime’s victims, the vast majority, to have meaningful “federalization”?

This imaginary allegory will have served its purpose if it allows the following arguments to be heard.

The constitutionalization of Iraq, if it is to succeed, must begin where we are, not in one of Jurgen Habermas’s “ideal speech situations”, or John Rawls’ “original position”. What is required is not the construction of some immediate – or subsequent – transcendent “constitutional patriotism” that is difference-blind to history, religion, ethnicity and nationality. Iraq’s prospects of survival as a state that may properly democratize lie in the creation of a multi-national, multi-regional federation, one that recognizes its existing deep diversity, and tries to resolve past antagonisms through a mixture of loose power-sharing and profound autonomy.

That is a far taller order than that facing Europe’s constitution.

Iraq’s constitution must first address the historic and continuing conflicts between Arabs and Kurds. The Kurds are neither Arabs nor Iraqis. They speak Kurdish; have a different culture, look different, do not fly Iraq’s flag, and insist that Iraq should not be defined as part of the Arab nation. Americans, who have leverage but lack dictatorial power, need to be clear about their sole ally in Iraq, and it would help if Europeans could overcome their anti-Americanism to tell them the same message: The Kurds do not want an “Iraqi nation-state.”

Kurds are willing, with extreme caution, to build a democratic, pluralist Iraqi federation. They have no love for the American prompted arranged marriage on offer after 2003. Kurdistan’s citizens prefer an immediate divorce. In January 2005, in a parallel private referendum held at the same time as the elections to Iraq’s constitutional convention, 98 per cent of two million voters endorsed an independent Kurdistan. “We deserve independence”, says President Masoud Barzani of Kurdistan, precisely because of what Kurds have suffered under successive Baghdad regimes, e.g. the destruction of 4,000 villages, forced displacement of hundreds of thousands, and the mass killing of up to 180,000 of their people under Saddam. The best feature of the liberation of Iraq from Saddam and its partial reconstruction is that it has strongly facilitated the healing of Kurdistan’s nasty civil war of the 1990s. Kurds are, so far, strongly politically united in the current negotiations and neither outsiders nor Arabs should count on being able to divide their two major parties.

But, Kurdistan’s leaders, and their people, may compromise their maximal preferences if their minimal interests are met. They have urgent, and easily appreciated “red lines” in the current negotiations.

- (i) They want full law-making autonomy in matters outside a small number of competencies for the federal government. That means keeping what they have, which has worked far better than anything they had before.

- (ii) They want the right to control their security, including the lawful army of Kurdistan, the peshmerga. No people in history has been willing to dissolve its army into the army of those whose officers organized genocide against them.
- (iii) They want regional ownership of natural resources which they need to fund their autonomy and security. Federations centralize quickly when regions do not have substantial revenues – which is why the European Union’s member-states mostly resist increasing the revenue capacities of the EU’s central institutions.
- (iv) They want satisfactory power-sharing arrangements in the federal government. They do not make a song and dance on this matter, but the federal electoral system and co-decision making procedures must enable them to block any legislative dictatorship by a party or coalition comprised of the Arab majority. For the same reason they want their right of self-determination to be respected, or a right to secession should the constitution be violated.
- (v) Lastly, they want a fair process to settle “disputed territories” - particularly a referendum to allow the province of Kirkuk to join the Kurdistan region. This is not aggression: it is no more than the refusal to grant Arabs the right of conquest, or of colonial settler infusion, which should be familiar to supporters of international law.

In the *Financial Times* of August 16 2005, the day after the deadline set by the US administration in the Transitional Administrative Law for the draft constitution of Iraq, the Prime Minister of the Kurdistan Region observed that

“Kurdistan’s leaders do not have a free hand, either to forget the past or to remake the future. The decision to accept the constitution will not be made by me or the president..., but by our National Assembly, and by our people voting in a referendum. If Kurdistan’s red lines are not met... our people will reject any new constitution”<sup>1</sup>.

Before this statement was published I had watched Kurdistan’s President, recently chosen by its elected National Assembly, make a solemn promise in advance, on public television.

Masoud Barzani promised not to sign an agreement in Baghdad on the 15<sup>th</sup> of August or after. Any draft, he declared, must be brought back to the Kurdistan National Assembly. That parliament may then guide Kurdish voters to vote for or against the ratification referendum scheduled for October 15. Two thirds of the voters in each of the three of the governorates presently encompassed in the Kurdistan Region would be sufficient to defeat the constitution.

Kurdistan’s platform, comprehensible once one understands its recent history, is, strangely, portrayed as ‘maximalist’, or as ‘unreasonable’ by many Europeans and Americans. They see Kurdistan taking advantage of its role as the US’s ally. I see only remarkable collective self-restraint. Arabists and Islamists in the wider world, of course, see the Kurds as part of a plot to break-up Iraq in America’s interests. If so, the plot is well-hidden among US policy-makers.

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<sup>1</sup> Nechirvan Barzani, “Why Kurdistan Insists on Kirkuk”, *Financial Times*, August 16 2005.

But what of the Arabs, the largest of the nationalities of Iraq? Notoriously any encounter with Iraq shows how divided they are - into the Shi'a majority and the formerly dominant Sunni minority, each of which now has the potential to become a separate nation-state. This division is not one invented by foreigners, and indeed it is one the Americans, ham-fistedly, have sought to bridge with their "all should just be Iraqi" formula. Masoud Barzani complained last August 15 that he should not have to resolve within half an hour disagreements between Shi'a and Sunni of "thirteen hundred years" standing.

The palpable reality of deep sectarian division among Arabs is simply ignored by those who casually talk of a nationalist "Iraqi resistance". The B'athist and Islamist insurgents at war with US troops, and their multi-national allies, are mostly Sunni Arabs. But they are also at war with the Shi'a dominated and properly elected Iraqi government. The jihadists among them are trying to provoke the Shi'a Arabs into a sectarian war – believing it will hasten America's departure. The methods they use – suicide bombings in market-places and outside mosques - are terrorist by almost anyone's definition. The exception is that repulsive branch of Islamist thought which decrees that Allah will decide the guilt or innocence of murdered civilians and children - and thereby licenses the complete abandonment of the moral control placed on guerrilla warfare by the notion of minimizing "collateral damage" to non-combatants.

What is their agenda? It is not mad; but it is not democratic, federal or pluralist. The jihadist insurgents and the B'athists want the Americans to leave, and then to restore the supremacy of Sunni Arabs. They will leave their internal disputes, perhaps, until later.

The Shi'a Arabs, by contrast, want the Americans to go when they can control Arab Iraq, what I hereafter refer to as Mesopotamia. "Please go, but for Allah's sake stay a little longer" is their considered refrain to Washington. For now, it is the Shi'a Arabs who matter, because the Sunni Arab insurgents cannot win, unless Washington decides on an undignified exit. In response to the jihadists' provocations, and perhaps not just in response, the Shi'a militia, notably the Badr Brigades, are killing B'athists, past and present.

If Shi'a Arabs had a free hand they would re-shape all of Iraq in their image, but they don't agree what that is. They are, presently, more disunited than Kurds. Some want an Iraq that looks like Iran, a theocracy, replete with the *shari'a*, outlawing alcohol, and the repression of women. They may get their way in provinces where they are strong, and in some places Islamic vigilantes are engaged in Koranic enforcement. But not all Shi'a Arabs conform to this stereotype. Some lived in exile in Iran, astringent therapy for those who want an Islamic state. Some insist that they are as Arab as they are Shi'a, and are wary of imitating Iran, or of becoming Tehran's clients. Others are secular. They vary, in short, between those who want to govern all of Iraq (including Kurdistan), those who confine their ambitions to Arab Iraq (Mesopotamia), and those who confine their ambitions to self-government in Shi'a dominated Arab Iraq (Baghdad and the South). This internal division among them may scuttle an agreement. Those who want to govern beyond Shi'astan want to make a deal with Sunni Arabs; those who want to govern primarily in Shi'astan are willing to make a deal with Kurdistan.

Shi'a Arabs and Kurds were Saddam's primary victims. Will that enable them to make a constitutional bargain? Perhaps. That is the logic of the situation, the one Sunni Arabs want to

prevent, by fair means or foul, including manipulating the logic of “inclusion” insisted upon by American and European diplomacy.

Key Shi‘a Arab leaders agree with Kurdistan on democracy, and on federalism, in principle. Democracy brought the Shi‘a Arabs to power – against the wishes and plans of the Bush administration. So, they are not opposed to democracy; on the contrary. But Shi‘a Arabs have been wedded to a “majoritarian” conception of democracy - in which the majority can do what it wants, with no constraints to protect human or minority rights, no restraints imposed by what Germans sensibly call “Basic Law”. That majoritarian conception has been reflected in many of the draft constitutional proposals from the parties that comprise the United Iraqi Alliance, and in their decision to over-ride in the Iraqi Assembly most of the more careful decisions of the sub-committees on the constitution.

Constitutionalism requires the tempering of this majoritarian impulse, and confining its full ambit to the emergent “Shi‘astan” of the South. It would be admirable, if in the interests of balance and pluralism, Shi‘a Arabs agreed to divide their large emergent region in two. But they are not presently inclined to be generous. After all, who has been generous to them in the twentieth century, and why should they trust anyone’s promises? They are the people who suffered Saddam’s revenge in 1991, when Europe and America left them to his mercies.

But, most realistic Shi‘a Arab leaders realize that they cannot dictate to Kurdistan. After all its ministers and peshmerga sustain the current Baghdad government, and the President of Iraq, Jalal Talabani, is a Kurd, precariously performing a juggling act for Iraq and Kurdistan, at the risk of losing support among Kurds and his own party. Intelligent Shi‘a Arabs realize that a federal bargain with Kurdistan is the price of Shi‘a pre-eminence in Mesopotamia, and of secure self-government for themselves.

Geology matters. Like the Kurds, many ordinary Shi‘a Arabs and their leaders want regional control over Iraq’s oil to ensure that locals benefit properly for the first time, rather than a predatory central government. Iraq’s black gold is in Kurdistan (especially if it has Kirkuk) and in the Shi‘a dominated southern provinces. Geology and politics therefore favor a deal on regional stakes in natural resources between Kurdistan and Shi‘astan.

Nor is this, in principle, a bad, grubby or exclusionary deal, as suggested by alarmed Sunni Arabs, and their apologists. Such ownership will endow the new federal units with sufficient power to make them work, and there can be financial redistribution to help the less well-endowed regions, and appropriate allocations raised for the limited competences of the federal government. Geography and demography also make a deal possible over Kirkuk, because January’s elections show that the United Iraqi Alliance, backed by Ayatollah Sistani, has few voters there.

So Kurdistan and Shi‘a Arabs may be able make a viable constitution that would clearly represent the combined interests of over eighty per cent of Iraq’s citizens, and would converge on democratic and federal arrangements. That certainly needs to be encouraged by domestic and foreign liberals.

Of course, it requires Shi‘a Arabs to decide what regional configuration they want for themselves. Some want a large – nine province – South. The leader of the Supreme Council for the Islamic Revolution in Iraq, Ayatollah Hakim, has become its champion, with the likely backing of Ayatollah Sistani. The weak incumbent Shi‘a prime minister, of the Dawa party, appears to be reluctant to follow this line. Hakim has almost certainly correctly calculated where both the votes and the ethno-religious sentiment lie, but the issue is not resolved.

But, what about the Sunni Arabs? And others?

Fair questions. It will be best if Kurdistan and the United Iraqi Alliance, their leaders and parties, make a principled deal that ensures a fair representation of minorities - including the interests of Sunni Arabs. Addressing the rights of Iraq’s Christians and other religious minorities should not be too troublesome ---- they are more threatened by Sunni wahhabists than by secular Kurds or Shi‘a Islamists. Iraq’s smaller nationalities, notably the Turkomen, can be fairly dealt with through proportional representation and cultural rights - such as they enjoy in Kurdistan, although you won’t find Ankara saying so in public. The real problem is the formerly dominant minority. For a start there are no obviously representative leaders of Sunni Arabs with whom to bargain.

Insurgent Sunni Arabs are at war with Shi‘a Arabs and in their dreams would re-conquer Kurdistan. The fallacy that they constitute an “Iraqi” nationalist resistance should be laid to rest: it is an illusion beloved by both Sunni Arabs and critics of America’s decision to depose Saddam. The resistance is that of a formerly dominant minority, and it is either fascistic or religiously fanatical, or both, in thought and deed; it is not a program of self-government, to the extent that it is a program it is one that demands to govern others against their will. Their international jihadist supporters in the Sunni world, notably al-Qaeda in Mesopotamia, regard the Shi‘a Arabs as heretics and treat Iraq as a site for a holy war of redemption. They don’t want to be, and cannot be part of the new constitution. The success of the constitution must be measured by their eventual defeat. They cannot be “included”, directly, or indirectly. To treat with others as their supposed interlocutors, as the Bush administration has undoubtedly contemplated, only serves to undermine the legitimacy of the transitional Iraqi government.

The non-insurgent Sunni Arabs are hopelessly divided. A minority are liberals, democrats, human rights activists, excellent people, but most have their heads cowed, for good reasons. Those abroad tend to promote “civic Iraqi” agendas, which is about as useful as saying secular prayers. More in Mesopotamia are nostalgic for Saddam, or at least for the Iraq before Saddam’s wars. They would, preposterously, grant Kurdistan the deal Ba‘athists offered --- but did not deliver on – in the 1960s and early 1970s. It is such nostalgic reactionaries, at best, who have been given voice and inclusion at the insistence of the US, the UK and the Europeans – a curious pay-off for the terrorism of their insurgent brothers, and one that will yield no worth while dividends. The Sunni Arabs in the negotiations, both elected and unelected, have so far refused, resolutely, to make any meaningful concessions on federalism. In fact, most of them want to postpone constitutional negotiations until there are fresh elections – having worked out that the boycott and intimidation harmed them they now seek to manipulate the provisions of the Transitional Administrative Law.

Not much sense can be expected from Sunni Arab spokesmen like Salih al-Mutlak, of the “Iraqi National Dialogue”, now their most widely quoted spokesperson in the international media, desperate for allegedly informed comment. He recently said that “no one can overlook a community that makes up 42 per cent of the Iraqi population”. He must have arrived at this peculiar demography by counting everyone who did not vote in January’s election as a Sunni Arab. But perhaps I am being unfair, perhaps he was misquoted, and seeks to count Kurds as Sunni Arabs! But, Al Mutlak is symptomatic. He and people like him need therapy to cope with their community’s loss of power. The name of his organization is just as symptomatic. It is a law of politics that an organization that calls itself “Dialogue” promotes monologue.

Most prominent Sunni Arabs speak the same monologue: “We don’t want federalism because it will break up the country; we want a strong centralized Iraq”. What they don’t say is that they want an Iraq in which they come back to power (and settle matters among their secular B’athists and Islamists). Yet, it is precisely these platforms, with low levels of electoral support, that the extraordinary majority of the peoples of Iraq are being asked, by outsiders, to “include” in the negotiated deal.

Americans and Europeans have themselves to blame for not seeing that realism and principle point in another, more productive direction. What the Kurdistan Alliance and the Shi‘a dominated United Iraqi Alliance must try to do in the next few days is to make a bargain. It must have sufficient protections – in human rights provisions, local self-government, security arrangements, and the distribution of oil and revenue resources – to ensure that enough Sunni Arabs will not oppose the new constitution when it is put to referendum in October 15.

It will not be easy, but it can be done, although time is running out. Sunni Arabs constitute a majority in four of Iraq’s governorates, eighteen of which were established under Saddam. To vote down the constitution Sunni Arabs need to mobilize two thirds of the voters to vote “No” in three of these governorates. They can deliver such an outcome in Anbar and Salahaddin, but, in my view, are most unlikely to be able to do so in Nineva (where there is a significant Kurdish population as well as Christian minorities), or in Diyala, where there are significant numbers of Shi‘a Arabs and Kurds. In these two provinces, provided they are supported, the relevant minorities can go to the polls to stop a jihadist victory or a B’athist restoration (whichever they fear most). Boycotts and intimidation that al-Qaeda and others will try to impose would only help a “Yes” vote.

This is not to recommend that an unprincipled constitution be rammed down the throats of Sunni Arabs. Their legitimate interests in self-government and human rights must be protected. But it is to say that their legitimate interests do not include holding the rest of Iraq to ransom, and there is a major difference between claiming the right to self-government and the right to govern others in a way that they reject. Sunni Arab leaders are like the traditional husband who has battered two wives, and who insists – threateningly - that both of them must come back to the old home. He promises things will be better, and recalls past honeymoons, but neither his fantasies nor his nostalgia are persuasive to the spouses who know his past. Provided that a constitutional draft largely composed by the Kurdistan and United Iraqi alliances protects the core interests of Sunni Arabs it is a fair bet that some Sunni Arabs will not vote against the

constitution. To do so would be to invite a deepened civil war in which they only have more to lose.

In short: there is a demographic, democratic, reasonable and realist constitutional path to the renewal of Iraq, in principle, as a democratic and pluralist federation. Of course, that does not mean that outcome is going to occur, but it does suggest that Europe and America, and its politicians, diplomats and intellectuals, might adjust themselves to that feasible possibility, and help its birth, rather than block it .

The negotiations, of course, are not being left “just” to the major and minor players in Iraq. Baghdad is awash with outsiders rendering advice – often on behalf of the Sunni Arabs, or with their own largely irrelevant agendas on how to make Iraq a nation-state. If the outsiders are not there, then they transmit their advice electronically. The UN is in town, as have been former lead players from the Organization for Security and Co-operation in Europe. It is not clear these external organizations, as opposed to the immediate advisors to the local negotiators, are of any great help, because they fail to see the bargain that must be made.

When the Transitional Administrative Law was made in the Spring of 2004 the Bush administration was in control of the wheel. That’s no longer so. But the US’s Ambassador, Zalmay Khalilzad, is doing his best to be an authoritative back-seat driver. To finish his job effectively, however, he will have to depart from Washington’s script; he has shown some signs of being willing to do so, but is handicapped by his “inclusive” rules of engagement.

The Bush administration has wanted a centralized (rather than federal and pluralist) Iraq for only two reasons that make any sense, at least to me. First, to have an Iraq that is a counter-weight to Iran. (It had hoped it would also be secular). That cause is lost; Iran and Shi‘a Arab Iraq, at least, will be at peace. The most feasible emergent political settlement will leave Shi‘a Arabs free to make their religious choices in the South. Second, the Bush administration has wanted to appease Turkey’s fears of an independent Kurdistan. But, the best way to discourage an independent Kurdistan is to promote an Iraq that Kurdistan accepts, namely, a democratic, pluralist and federal Iraq that meets Kurdistan’s “red lines”. Turkey’s accession process to the European Union admirably serves to restrain the Kemalist instincts of some of its military.

The Bush administration has neither been a competent imperialist, as suggested by its European critics, nor an intelligent democracy-exporter, as claimed by some of its supporters. If it had been comprised of the ruthless oil-stealing imperialists its opponents imagine then dividing Iraq, and having a sovereign Kurdistan and a sovereign “Shi‘astan” able to supply large amounts of oil to the world-market would have been its smart strategic choice. In short, it has not sought to do what Osama bin Laden has said it is trying to do. If, by contrast, as it has claimed, the Bush administration had been interested in promoting a democratic Iraq, and transforming the Middle East, then it would have worked out a long time ago that it should support and broker a settlement between Kurdistan and the United Iraqi Alliance, while encouraging them to make a settlement that was fair to Sunni Arabs – which is not the same as supporting their so-called leaders’ unappeasable demands.

As negotiations splutter toward the second deadline it is past time that outsiders, especially Americans and Europeans, reframe their thinking, morally and politically. I fear, however, that it will be too late. It won't only be the Americans who should be held responsible if there is a full-scale constitutional train-wreck.

August 19 2005.